

FILED BY CLERK

MAR -9 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

GINA O.,)	
)	2 CA-JV 2009-0102
Appellant,)	DEPARTMENT A
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
ARIZONA DEPARTMENT OF)	Rule 28, Rules of Civil
ECONOMIC SECURITY,)	Appellate Procedure
ALEJANDRO M., ELYANNA M.,)	
and NATHAN M.,)	
)	
Appellees.)	
)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 17769300

Honorable Joan L. Wagener, Judge Pro Tempore

AFFIRMED

Child Advocacy Clinic

By Paul D. Bennett, a clinical professor appearing
under Rule 38(d), Ariz. R. Sup. Ct.

Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Pennie J. Wamboldt

Prescott
Attorney for Appellee Arizona
Department of Economic Security

E S P I N O S A, Presiding Judge.

¶1 On August 31, 2009, the juvenile court terminated the parental rights of appellant Gina O. to her three children, Elyanna, Alejandro, and Nathan, on grounds of abandonment, abuse or neglect, and Gina's failure or refusal to remedy the circumstances causing the children's nine-month out-of-home placement, pursuant to A.R.S. § 8-533(B)(1), (B)(2), and (B)(8)(a). Gina contends the termination proceeding was rendered fundamentally unfair by the court's failure to conduct an adequate factual inquiry before denying the request Gina made for different appointed counsel as the severance hearing began.

¶2 The relevant facts are undisputed; we nevertheless view the evidence and all reasonable inferences permitted by that evidence in the light most favorable to upholding the juvenile court's order. *See Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, ¶ 2, 181 P.3d 1126, 1128 (App. 2008). The Arizona Department of Economic Security (ADES) took the children into protective custody and filed a dependency petition in August 2008. The juvenile court appointed counsel for Gina at the preliminary protective hearing held on August 15, 2008. The children were adjudicated dependent in September 2008, and the matter proceeded to a contested termination hearing on June 30, 2009. The same lawyer represented Gina throughout the ten-month pendency of the proceedings. At the initial severance hearing on May 1, 2009, Gina was present and did not object when the court reappointed counsel for the contested termination hearing.

¶3 As the termination hearing began on the afternoon of June 30, 2009, Gina's counsel told the juvenile court that, just that afternoon, Gina had informed him she felt he

“had not represented her interests.” Addressing the court directly, Gina stated: “I feel like this is a big matter in my life. And every time I talk to my lawyer there was, it was a lose-lose situation with him. And I don’t like the way he represents me and my best interests.” Asked by the court if “there [was] anything else,” Gina replied, “No,” then confirmed that she was asking the court to appoint a different lawyer to represent her.

¶4 Counsel for ADES and counsel for the children both objected to postponing the termination hearing. Counsel for ADES stated: “Your Honor, this hearing has been set for some[]time. The State is ready to go forward today. I think it would be a disservice to the children to delay permanency for them any further.” Counsel for the children joined in the objection and added: “Also, we had a facilitated settlement conference [on May 28, 2009], and nothing was mentioned at that hearing. This has been set since May 1st, and I think that would have been prudent to have asked for that before today. I think that it’s a delay tactic.”

¶5 On appeal, Gina asserts there had been a “breakdown of the attorney-client relationship” so severe “that the attorney and client had not spoken to each other before the trial.” She contends the juvenile court failed to make sufficient inquiry to determine whether there was “a complete breakdown in communication or an irreconcilable conflict” between Gina and her lawyer. The court’s “failure even to inquire about the circumstances existing at the time of trial,” Gina contends, “constitutes reversible error and mandates a new trial.”¹

¹Gina also asserts that ADES is partially responsible for the untimeliness of her request for different counsel. Her case manager, Cynthia Ramirez, testified that,

¶6 Although the rights of parents in severance proceedings are not coextensive with the rights of criminal defendants, *Denise H. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 257, ¶ 5, 972 P.2d 241, 243 (App. 1998); *see also John M. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 320, ¶ 15, 173 P.3d 1021, 1025 (App. 2007), indigent parents have a due process right, codified in A.R.S. § 8-221, to the appointment of counsel. *Daniel Y. v. Ariz. Dep't of Econ. Sec.*, 206 Ariz. 257, ¶ 14, 77 P.3d 55, 58 (App. 2003); *see also Ariz. R. P. Juv. Ct. 38*. We have previously looked to the criminal law for the standards applicable to a parent's waiver of the right to counsel in a termination proceeding. *See, e.g., Daniel Y.*, 206 Ariz. 257, ¶¶ 14-17, 77 P.3d at 58-59. And, in the absence of Arizona authority specifically applicable to severance proceedings, we likewise look to the criminal law as analogous and useful, though not necessarily dispositive, in evaluating the juvenile court's denial of Gina's request for the appointment of substitute counsel.

¶7 We review the denial of a motion for substitution of counsel for a clear abuse of the trial court's discretion. *See State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 8, 154 P.3d 1046, 1050 (App. 2007). In a criminal prosecution, "[a] trial court abuses its discretion if it fails to inquire into the basis for the defendant's dissatisfaction with

sometime after the May 1 initial severance hearing, Gina had "called to ask how she could get a new attorney." Because Gina's assertions about the case manager's response to that inquiry are unsupported by citations to the record or to legal authority, we do not consider them further. *See Ariz. R. P. Juv. Ct. 106* (Ariz. R. Civ. App. P. 13 through 16 applicable to appeals from juvenile court rulings); Ariz. R. Civ. App. P. 13(a)(4), (6) (factual statements and legal arguments shall contain citations to record and relevant legal authority).

counsel or fails to conduct a hearing on the defendant's complaint after being presented with specific factual allegations in support of the request for new counsel." *Id.* "If a defendant makes sufficiently specific, factually based allegations in support of his request for new counsel, the . . . court must conduct a hearing into his complaint." *United States v. Lott*, 310 F.3d 1231, 1249 (10th Cir. 2002); *State v. Torres*, 208 Ariz. 340, ¶ 7, 93 P.3d 1056, 1059 (2004).

¶8 Not every expression of dissatisfaction with counsel requires an in-depth inquiry or formal hearing, however. "[G]eneralized complaints about differences in strategy may not require a formal hearing or an evidentiary proceeding." *Torres*, 208 Ariz. 340, ¶ 8, 93 P.3d at 1059; *see also State v. Tejeda*, 677 N.W.2d 744, 751 (Iowa 2004) (stating courts not required to "conduct a hearing every time a dissatisfied defendant lodges a complaint about his attorney"). And disagreements with counsel over strategic or tactical decisions are not evidence of an irreconcilable conflict between lawyer and client. *Lott*, 310 F.3d at 1249. *Compare State v. Henry*, 189 Ariz. 542, 547, 944 P.2d 57, 62 (1997) (finding "ample evidence" in record that alleged conflict was "nothing more than a disagreement over appropriate defense strategies"), *with State v. Moody*, 192 Ariz. 505, ¶ 13, 968 P.2d 578, 580 (1998) (deeming "record . . . replete with examples of a deep and irreconcilable conflict," requiring change of counsel). Nor does a general "loss of trust, without more, require[] a trial court to appoint new counsel." *Paris-Sheldon*, 214 Ariz. 500, ¶ 14, 154 P.3d at 1051.

¶9 The nature of the inquiry required in any given case will depend upon the nature and specificity of the client's assertions. *Torres*, 208 Ariz. 340, ¶ 8, 93 P.3d at

1059. And it is the client's burden to demonstrate that he or she "has a genuine irreconcilable conflict with . . . counsel or that there has been a total breakdown in communications." *Id.* Here, we believe the juvenile court's inquiry was sufficient under the circumstances, given Gina's brief, generalized complaints, the surrounding circumstances, and the other information already known to the court.

¶10 The juvenile court did not rule without benefit of facts. Besides Gina's brief statement requesting different counsel as the termination hearing began, the court also had the benefit of counsel's comments:

Your Honor, obviously, [I am] reluctant to represent a client where the client expresses lack of confidence in my representation. But there has been a problem with communication for reasons unclear to me. Mail addressed [to] my client has been returned, stamped on the face of [the] envelope, moved. I have not had contact with [Gina] since the last hearing.

So it's been very challenging to engage in the process of preparing for trial. I don't have an explanation for that lack of communication. I'm not at this juncture being critical of my client. I will tell you that communication has not been present.

¶11 Thus, according to counsel, the problem was not so much a breakdown in communication between himself and Gina as their inability to communicate due to Gina's failure to maintain contact with counsel and to be available for necessary communications between them. Indeed, in ruling, the juvenile court observed, "I think communication is a two way street, so is the responsibility for maintaining that communication." Although there may indeed have been "such minimal contact with the attorney that meaningful communication was not possible" here, *Torres*, 208 Ariz. 340,

¶ 8, 93 P.3d at 1059, *quoting Lott*, 310 F.3d at 1249, the record supports the court’s implied finding that Gina herself was largely responsible for the lack of contact and communication with counsel.

¶12 In addition, as of June 30, 2009, the juvenile court had over nine months’ familiarity with Gina, her counsel, and the dependency proceeding. The same judge had presided over the case since before the preliminary protective hearing on August 15, 2008, when it had initially appointed counsel. It had likewise presided over two subsequent hearings, in September 2008 and January 2009, that Gina had failed to attend without explanation to the court or her counsel. It had made an express finding at the latter of those hearings that Gina was “not in compliance with the case plan[,] her current whereabouts [we]re unknown and she has failed to maintain contact with the Department and counsel for a significant period of time.” *See State v. Peralta*, 221 Ariz. 359, ¶ 18, 212 P.3d 51, 55 (App. 2009) (new counsel not required when defendant “primary cause of any damage to the relationship between himself and his counsel.”).

¶13 The court had also presided over the permanency hearing on April 6, 2009, receiving evidence then that Gina had not participated in any reunification services during the eight months since the dependency petition was filed, had not maintained contact with ADES, and had not visited the children since October 30, 2008. Thus, before ordering the case plan goal changed to severance and adoption and before scheduling the June 30 termination hearing, the court already knew Gina had not been

participating in any meaningful way in her case plan.² Moreover, at the initial severance hearing on May 1, 2009, in Gina’s presence and without her objection, the court had reappointed counsel for purposes of representing her at the termination hearing. And Gina had subsequently appeared with counsel at a facilitated settlement conference on May 28, 2009, without mentioning her desire for different counsel.

¶14 Although the juvenile court could have inquired more extensively into Gina’s specific complaints about counsel on June 30, we are unprepared to say the court abused its discretion. Unlike the defendant in *Torres*, who had “presented specific factual allegations that raised a colorable claim that he had an irreconcilable conflict with his appointed counsel,” 208 Ariz. 340, ¶¶ 2, 9, 93 P.3d at 1057-58, 1059, Gina had waited until the termination hearing was set to begin to voice her generalized dissatisfaction with “the way [counsel] represent[ed her] and [her] best interests” and to complain that, whenever they did speak, it seemed like “a lose-lose situation with him.” Given Gina’s marginal efforts to comply with the requirements of her case plan, it is inferable the “lose-lose situation” she described was merely counsel’s realistic assessment that the motion to terminate her parental rights was likely to be granted.

¶15 Additionally, in contrast to a criminal prosecution, in which “the personal liberty interest of a criminal defendant” is at stake, “a termination proceeding involves more than a parent’s fundamental liberty interest in the care, custody, and control of h[er]

²Evidence introduced at the termination hearing established that Gina had made no sustained effort to take advantage of the rehabilitative services ADES offered her or comply with her case plan tasks and had tested positive for methamphetamine use as recently as April 7, 2009.

child[ren].” *John M.*, 217 Ariz. 320, ¶ 15, 173 P.3d at 1025. The juvenile court here was presumably, and appropriately, mindful of the need to balance Gina’s request for different counsel against the competing interests of her young children “in stability, safety, security, and a normal family home . . . as well as [in] the ‘prompt finality that protects’ those interests.” *Id.*, quoting *In re Pima County Juv. Action No. S-114487*, 179 Ariz. 86, 97, 876 P.2d 1121, 1132 (1994). Given the timing of her request, the nonspecific nature of her complaints about counsel, and other circumstances known to the juvenile court, we cannot say the court abused its discretion in failing to conduct a more comprehensive inquiry before denying Gina’s request for different counsel.

¶16 The juvenile court’s order of August 31, 2009, terminating Gina’s parental rights to Elyanna, Alejandro, and Nathan, is affirmed.

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge